CORPORATE GOVERNANCE

March 14, 2013

Elizabeth M. Murphy, Secretary
U.S. Securities and Exchange Commission
100 F Street, N.W.
Washington, DC 20549

Re: New York Stock Exchange Proposed Rule – Proxy Distribution Fees
File No. SR-NYSE-2013-07

Dear Ms. Murphy:

I am a long-time retail shareowner, as well as the publisher of Corporate Governance (CorpGov.net) designed to promote shareowner education and involvement.

This is in response to the proposed rules regarding fees to be charged to issuers and other parties involved in distributing proxy and other materials to beneficial owners holding securities in street name, which the New York Stock Exchange (NYSE) filed with the Securities and Exchange Commission ("SEC") to amend NYSE rules 451 and 465.

I request the SEC extend the period for comments using your authority under Section 19(b)(2)(A) of the Securities Exchange Act, given the complexity of the issues involved in the proposed rule, and amend the rules to take into account the need for open forms of client directed voting systems.

I am concerned that incentives provided to brokers for developing Enhanced Broker's Internet Platforms (EBIPs) through the proposed regulations do not extend to other more open platforms, such as ProxyDemocracy.org, Sharegate.com or other websites. These and other entities should be afforded at least the same incentives as brokers and, I would argue, much more because of their educational value.

One of the four stated goals of the Exchange's Proxy Fee Advisory Committee (PFAC), according to the Release, is

> To encourage and facilitate active voting participation by retail street name shareholders.

A second goal is

> To ensure the fees are as fair as possible, reflecting to the extent possible both economies of scale in processing, and sensitivity to who (issuer or

broker) benefits from the processing being paid for...

The rulemaking does nothing with regard to the first and completely leaves shareowners out of the equation in the second. I question whether or not actual retail shareowners or groups representing them were consulted by the PFAC.

On its surface, EBIPs offer no real benefit to retail shareowners over e-delivery. It takes more effort to respond to an e-mail by logging into a broker account to vote than it does to simply click on a secure link within the e-mail and vote on ProxyVote.com. The Release describing the rulemaking offers no explanation as to why clients will convert to voting electronically though their broker's EBIP as opposed to through the current system. There is no obvious time or information benefit.

However, one can easily imagine brokers realizing the real deficiency of the current system with regard to retail turnout -- the difficulty of voting each company individually for each account and the lack of information or analysis provided to shareowners. Brokers who set up EBIPs might be further incentivized to create default mechanisms that allow votes to be cast in a fashion agreed upon through "client directed voting" where clients can simply click once to have default choices voted, instead of going through each item on the ballot.

This could essentially lead us back to mindless, uninformed voting that improperly tips the scales, of the type we recently got rid of by banning most forms of broker voting.

Background

Historically, most retail shareowners toss their proxies. During the first year under the "notice and access" method for Internet delivery of proxy materials, less than 6% voted. This contrasts with almost all institutional investors voting, since they have a fiduciary duty to do so. "Client directed voting" (CDV), a term coined by Stephen Norman, is seen by many as a solution for getting more retail shareowners to vote, ensuring companies get a quorum, and helping management recapture a good portion of the broker-votes cast in their favor that evaporated with recent reforms.

I strongly oppose the EBIP provisions contained in the current rulemaking because of this likely path. I recommend the rulemaking be delayed and amended to encourage an open form of CDV, which could result in getting out the vote and achieving a quorum through more educated and thoughtful voting.

Retail investors are the principals in the principal-agent system of corporate governance. We are the beneficial owners of all equities – in the U.S., 25 to 30 percent via direct purchases, and 70 to 75 percent via our "ownership" of shares in mutual funds, pension funds and other intermediaries. The agents in our corporate governance system include CEOs, boards of directors, institutional investors, proxy advisory firms, compensation consultants, etc. An "Open Proposal" on CDV will improve the accountability of all these agents to the principals by empowering retail investors with better information and voting tools.

Since Stephen Norman coined the phrase in 2006, the concept of CDV is generally attributed to him and his work with NYSE's Proxy Working Group. Looking back at the origins of the concept, on October 24, 2006, the NYSE filed a proposed rule change with the SEC to eliminate all broker voting in the election of directors. Two months later in December 2006, Steve Norman presented a proposal called "Client Directed Voting" to an investor communications conference (available at http://www.governanceprofessionals.org/society/NewsBot.asp?MODE=VIEW&ID=2376&SnID=5 - director).

The case for CDV was again made on the Harvard Law School Forum on Corporate Governance and Financial Regulation by Frank G. Zarb, Jr. and John Endean in their essay, "Restoring Balance in Proxy Voting: The Case for Client Directed Voting" (available at http://blogs.law.harvard.edu/corpgov/2010/02/14/restoring-balance-in-proxy-voting-the-case-for-client-directed-voting/). Similar to Norman, the voting options presented were severely restricted to the following: (1) in proportion to other retail shareholders; (2) in a manner consistent with the board's recommendation; or (3) in a manner that is contrary to the board's recommendation.

John Wilcox's post several weeks later, "Fixing the Problems with Client Directed Voting" (available at http://blogs.law.harvard.edu/corpgov/2010/03/05/fixing-the-problems-with-client-directed-voting/), helped to expand and popularize the concept beyond Norman's initial concept with a more open proposal.

The PFAC and SEC should review the work of Mark Latham, a former member of the SEC's Investor Advisory Committee, who proposed something similar to CDV in the year 2000. See "The Internet Will Drive Corporate Monitoring" and other papers on the VoterMedia.org Publications page at http://www.votermedia.org/publications. In stark contrast to Norman's, Latham's proposed system is open and competitive, using a market-driven framework. See also Latham's post, Client Directed Voting Q&A, also found on the VoterMedia.org Publications page at http://www.votermedia.org/publications).

How Open CDV Would Work

Open CDV enables retail shareowners to implement a specialization strategy similar to that of institutional investors. Most fund managers do not read the proxy statement and understand the proposals in the context of a company's particular circumstances. They have specialized staff for that review, some in-house, some out-sourced. Likewise a few retail shareowners will read proxies, but most will not. Those who do not read proxies can increasingly be informed by those who do and if they post their votes or facilitate posting by third party aggregators on the Internet.

With an Open Proposal, anyone can create a voting feed, just as anyone can now create a blog. One way to create a feed is to remix other feeds, just as blogs often post or link to material from other blogs. A remixed feed can select different source feeds for different stocks or different industries or different categories of voting matters (director elections vs. shareowner proposals etc.). In his article The Internet Will Drive Corporate Monitoring, Latham called remixed feeds "meta-advisors."

A small but important percentage of retail shareowners will get more involved in helping to determine voting feed reputations. They will compare feed quality and issue/value identification by such means as creating focus lists at ProxyDemocracy.org. See, for example such a list on climate change resolutions at http://proxydemocracy.org/fund_owners/focus_lists/25.

Most retail investors will only pay attention to the best-known voting feeds. A small minority of institutional and retail investors, along with writers in the financial media, are likely to become the most influential opinion leaders helping to determine public reputations, and thus which of potentially hundreds of voting feeds deserve to be followed.

Investors should be able to choose voting feeds and instruct our brokers to implement them for our shares. That is powerful because it takes little time, yet can implement intelligent voting based on reputation – just as the reputations of carmakers and computer makers are widely available and influence our purchases.

There is already a healthy base of "brands" developing with Domini, Calvert, Florida SBA, CalSTRS, CalPERS and others announcing a growing number of their votes in advance of annual meetings.

Moxy Vote had already built an open CDV platform on a relatively low budget before it went down. ProxyDemocracy.org and Sharegate.com can be readily enhanced to include voting capability if the SEC adopts additional data standardization and if cost reimbursement is forthcoming from issuers. See Moxy Vote's August 17, 2012 petition to the SEC at http://www.sec.gov/rules/petitions/2012/petn4-651.pdf and their October 20, 2010 comments on the SEC's proxy plumbing concept release at http://www.sec.gov/comments/s7-14-10/s71410-181.pdf.

Essential Elements of Open CDV

The key issue in any open CDV system is to let shareowners control where their electronic ballots are delivered. Just as there is no question shareowners can control where hardcopy ballots are delivered, there should be no question they can direct where their electronic ballots are delivered. This simple requirement would insure third-party content providers an opportunity to compete and improve the quality of voting advice.

Additional elements for a more effective CDV system include:

- A wide range of voting opinion sources that will eventually cover all issues;
- Open access for any new opinion sources to publish their opinions;
- Open access for shareowners to choose any opinion source for our standing instructions on voting;
- Sufficient funding for professional voting opinion sources that compete for funding allocated by retail shareowner vote (or by beneficial owners of funds that may choose to "pass through" their votes).

Under an Open Proposal, feeds will offer the ability for retail shareowners to essentially build a "voting policy," just as institutional voters are now able to do. That model will increase participation and voting quality. We shouldn't ask shareowners to affirm every single pre-filled ballot. That could be a deal breaker for people with stock in many different companies who would rather spend their time on other activities.

Third-party CDV systems will allow investors to create hierarchies of voting instructions. (Vote like X. If X hasn't voted the item, vote per Y. If Y hasn't voted, vote per Z, etc. Eventually, these systems could become very complex. Vote like X on issue A; vote like Y on issue B, also specifying defaults if either X or Y don't have votes recorded.)

If brokers are required to deliver proxies as directed by their clients, another whole model could emerge around "proxy assignments." Proxies assigned to organizations or individuals, for example, could give annual meetings a new meaning. See "Perspectives: Investor Suffrage Movement" by Glyn A. Holton at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=953023.

In the 1940s and 1950s thousands of shareowners frequently showed up for shareowner meetings because they frequently deliberated issues and some of those in attendance held substantial proxies from others. Lewis Gilbert, for example, was often given unsolicited proxies, which he used to negotiate motions at meetings.

Impact of Open CDV

We are a long way removed from those days and advance notice requirements would preclude many of the activities Gilbert made famous. Voting at meetings is important, but having a say in setting the agenda on what will be voted on is even more powerful. If a significant number of proxies are assigned to others or thousands of shareowners routinely follow specific voting advisors or institutions, leading voices can actually begin to influence how agendas for annual meetings are set.

An Open Proposal will increase both the quantity and the quality of voting by both retail and institutional investors. Ease of voting and the ability to align with valued brands will drive quantity. Increased quality will result from competition between voting opinion sources for reputation in the eyes of investors. Opinion sources will include institutional investors, hedge funds, retail investors, bloggers, activists and professional proxy voting advisors funded by new mechanisms discussed later in this letter.

An Open Proposal will cause retail shareowners to engage in proxy voting because it offers several new and powerful ways for us to do so, while respecting our other interests and time constraints.

Additionally, institutional investors will begin to discuss their votes with each other more frequently, as well as with beneficial owners and funds. This is already happening. I have personally initiated such conversations with several funds and have increasingly been met with a favorable response. As funds learn how and why other funds are voting, many are open to reexamining their own positions.

Director elections in particular will be more closely watched, once shareowners gain a sense of empowerment. Prior to nascent CDV sites, we had little or no basis for voting against or withholding votes from individual directors. Soon we will be able to drill down through recommendations to discover which directors are over-boarded, miss meetings, have potential conflicts of interest, were on compensation committees that overpaid executives, etc. Funds will increasingly provide the reasons for their votes, since that will drive more investors to vote with them. When a fund discloses not only their vote, but also the reasons for their vote, investors get a better picture of fund values and begin to trust given "brands" as consistent with our own values.

Restrictions

Limiting CDV to only selected situations, like uncontested elections, would only lessen the benefits of CDV, so I don't recommend imposing any such limits. It would be better not to establish any CDV through regulations that severely limits voting options, since once such systems are enacted they will be difficult to amend, given that those who benefit from such limitations will be in an even stronger position to fight opening up the process.

All matters should be eligible for inclusion in a CDV arrangement. All can be handled the same way, with the retail shareowner voting as per standing instructions to use specified voting feeds. Systems should allow users the ability to override standing instructions in any given situation. Competition among voting feeds will encourage those who create them to constantly improve their voting quality and reputation. One improvement is to adapt their analysis and voting decisions to the significant variation among proposals on any given matter. Another is to create industry specific analysis. Analysis could also vary by a company's maturation and/or a great many other factors. Deeper levels of analysis are more likely with open CDV systems that enhance competition.

System Defaults

The default choice should either be whatever the shareowner selects or it should be a "not voted" vote, just like if a voter fails to mark an item on the proxy, that item should be left blank, although it is now often counted in favor of management. (See my petition to the SEC for a rulemaking File 4-583 with broken link on the SEC site at http://www.sec.gov/rules/petitions.shtml or as discussed at http://blogs.law.harvard.edu/corpgov/2009/06/02/dont-let-companies-change-shareholders-blank-votes/

Counting a blank vote as anything else would make mounting campaigns to deny companies a quorum much more difficult. Neither brokers nor anyone else should be permitted to vote on any ballot item in the absence of voter instructions (i.e., all items should be considered non-routine matters in NYSE rules).

Brokers/banks should not be the focus of incentivizes to take on CDV design responsibilities, since other third-party specialist firms have already shown initiative and will probably do a better job. The key is to ensure that brokers or their agents deliver ballots to whomever the shareowner directs. Of course, it would also be a plus if brokers and banks would make their clients aware of the available third party platforms.

Competition for Funds Would Enhance CDV

I would recommend an ongoing competition open to providers of investor education, which would compete for funding allocated by retail investor vote. This could be limited to education about voting issues (informing CDV, providing voting opinions, organizing voting opinion data feeds, discussing reputations etc.), or voting could be included in a broader retail investor education competition. For more explanation, see Mark Latham's "Voter Funded Investor Education Proposal" (November 30, 2009 at http://votermedia.wordpress.com/2010/01/23/voter-funded-investor-education-proposal/).

In the near term, the entrenched agents in our corporate governance system may try to prevent investors from using our funds to empower ourselves this way, so enabling regulations from the SEC and public funds would be helpful to get started. Public funds earmarked for retail investor education and advocacy could be used for the first such initiatives.

Cost

Cost categories for CDV include: (a) creating voting opinion feeds; (b) system development for brokers; (c) vote processing by Broadridge or similar service providers.

If the SEC publicly encourages the development of CDV, many organizations are likely to build the necessary systems. As previously mentioned, voting opinion websites have already appeared (ProxyDemocracy.org, MoxyVote.com) or are waiting in the wings (Sharegate.com). To enhance their quality, public funds earmarked for retail investor education and advocacy could be allocated by investor vote among such competing providers of tools for CDV.

CDV will increase the quality of voting and decrease the quantity and costs of paper mailings. These benefits will outweigh the costs of building CDV systems. Standardized data tagging will likewise streamline the system and reduce costs in the long run, although it will require some up-front investment.

NYSE rules currently require payment by issuers for the cost of voting electronically but issuers were not always be making such payments to CDV platforms like Moxy Vote. See NYSE Rules 450-460 pertaining to proxy distribution, available at http://nyserules.nyse.com/NYSETools/PlatformViewer.asp?searched=1&selectednode=chp%5F1%5F5%5F12&CiRestriction=460&manual=%2Fnyse%2Frules%2Fnyse%2Drules%2F. The Rules are actually written for "member organizations" (i.e., brokers), and specify what brokers or their agents (e.g., Broadridge) can charge for distribution and collection of proxy-related items. The rules are clear that Issuers are supposed to pay for all of the distribution (and collection) costs and that brokers can expect to collect from them. These rules should be amended to apply to Issuers when shareowners choose to take delivery of proxies or to vote through sites like Moxy Vote, ISS, Glass Lewis or Sharegate.

The fees that Broadridge is charging to electronic voting platforms (ISS, Glass Lewis, Moxy Vote, etc.) should be paid by the issuers as part of the overall collection costs (like postage). The electronic platforms, in this function, are merely an extension of the proxy distribution agent. However, I understand that Broadridge charges on the order of 10X for electronic vote collection from these platforms than it is permitted to charge the issuers.

If Broadridge is offering a "value-added" service to these electronic platforms, where is the "baseline" service that costs less? Perhaps the value-added services revolve around the ability to turn blank vote into votes for management without following the rules that apply to proxies. (See my blog post, Jim Crow "Protections" for Retail Shareowners at http://corpgov.net/2010/04/one-real-ballot-for-big-investors-a-fake-one-for-the-rest-of-us/)

My understanding is that fees are charged to electronic platforms on a "per ballot" basis (generally one fee per position per year) and that electronic platforms are generally passing along these costs to voters. That becomes much more difficult, perhaps impossible, when trying to service retail shareowners with small position sizes and many more per ballot transactions, relative to shares voted.

This, in effect, becomes a system where the voter is paying to vote, like the old Jim Crow poll tax. It also inhibits progress (i.e., the development of electronic platforms for retail shareowners) because voting through the mail and through the phone is free. Why should retail shareowners or their service providers have to pay when voting online, which is inherently the least expensive method of voting? Why should services like Moxy Vote have to front such expenses? Without a change, it is hard to see how independent CDV sites can ever turn a profit and it seems even less likely that nonprofits, such as Proxy Democracy, would ever be able to offer users the option of voting on a Proxy Democracy platform. Such costs need to be eliminated or minimized if a robust open CDV system is to mature.

The NYSE should consider forcing Broadridge to direct some of its "paper suppression fees" to firms like MoxyVote.com, if it can be resurrected. They should be sharing in this incentive, since shifting to electronic from paper voting saves money. That would be a simple way of beginning to address the cost issue. The most fundamental point regarding costs is that issuers should bear the actual cost of voting, not shareowners or CDV systems.

Conclusion

NYSE's rulemaking concerning Proxy Distribution Fees attempts only to address the needs of issuers, brokers and Broadridge. It completely leaves out shareowners. The rulemaking should be delayed and amended to facilitate an open CDV system, which improves corporate governance because voting advisors will make it easier for shareowners to meaningfully participate in voting, without having to read through all the proxy materials.

Open CDV systems enhance voting by allowing shareowners to informally build individualized proxy voting policies, much like formal policies maintained by many institutional investors. Unlike many institutional investors, who may ponder over their voting policies for months, retail shareowners will mostly build default policies based on brand identification. Voting advisors, chosen by shareowners through competitive markets for shared information, will help make agents more accountable and democracy in corporate elections an emerging reality.

Sincerely,

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